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IN THE

Supreme Court of the United States

April Term, 1976

No. 75-1406

JOAN ELIOPULOS
Petitioner

v.

V. H. HILDYARD, M.D., AND
MEDICAL ADMINISTRATIONS, INC., ASSIGNEE
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents, V. H. Hildyard, M.D., and Medical Administrations, Inc., Assignee, urge that petitioner's writ of certiorari be denied. This brief is offered in support of respondents' position.

Respondents will rely on the opinions below, the allegations of jurisdiction, and the questions presented for review as presented by petitioner. We shall attempt to clarify her statement of the case and will then state our argument and conclusion.

STATEMENT OF THE CASE

Petitioner has confused and intertwined two separate cases in her petition for certiorari. Respondents will therefore attempt to clarify the history of this case, and to separate it out from the case which is not at bar.

On January 12, 1972, a suit was filed in the County Court in and for the City and County of Denver, Colorado, by

Medical Administrations, Inc., as assignee of Dr. V. H. Hildyard, for $475.00 (plus interest and costs), the amount claimed for the reasonable value of professional services rendered by Dr. Hildyard to the defendant, Joan Eliopulos. Ms. Eliopulos filed a complaint, answer and counter-claim in excess of the County Court's jurisdiction, and requested and was granted a transfer of the case to the District Court in and for the City and County of Denver. The case, when transferred to the District Court, was styled *Joan Eliopulos v. Medical Administrations, Inc., Assignee, and V. H. Hildyard, M.D.*, Civil Action No. C-27482. Plaintiff's counterclaim essentially alleged willful, careless, reckless and negligent diagnosis and performance of the operation. Originally, she requested relief in the amount of $62,500 for anticipated further medical expenses, pain and suffering, and mental suffering. She later amended her complaint, citing an award received by Dr. Hildyard in an entirely separate personal injury action wherein he was the plaintiff (this is the case identified in petitioner's brief as Civil Action No. C-11660). She added to her complaint "willful and wanton disregard for plaintiff's rights and feelings" and increased the amount of damages sought to $300,000, for pain and suffering, temporary and permanent disability, loss of full enjoyment of life, and exemplary damages. Defendants moved to strike the reference to the damages awarded Dr. Hildyard in the other case, which motion was granted February 26, 1973. Petitioner has not appealed the granting of that motion, yet she brings up the doctor's personal injury action again in this petition.

Petitioner had a number of attorneys enter and withdraw on her behalf throughout the course of this case, resulting in her complaint being amended twice. The final amended complaint, on which trial was had, alleged five causes of action, here briefly summarized: (1) performance of the surgery with knowledge of a physical disability affecting such performance, (2) improper diagnosis, (3) negligent perfor-

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mance of the surgery, (4) negligence in not obtaining plaintiff's informed consent, and (5) breach of warranty. Trial to a jury was begun, and at the close of plaintiff's case the trial court granted defendant's motion for directed verdict on all counts. Additionally, Medical Administrations' claim for services rendered was dismissed with prejudice. (Judgment entered February 20, 1975.) Plaintiff appealed to the Colorado Court of Appeals, which affirmed the findings of the trial court on the first four counts, but reversed and remanded for a new trial on the breach of express warranty claim (Pet.'s brief, appendix B, pp. 2a-5a). The petitioner sought and was denied rehearing, and then petitioned the Colorado Supreme Court for a writ of certiorari, which was denied on February 17, 1976, (Pet.'s brief, appendix B, p. 6a). She then presented the instant petition for certiorari to this Court.

ARGUMENT

Respondents assert that this Honorable Court should refuse to hear this case for two reasons: (1) it is not a "final action" within the meaning of 28 U.S.C. 1257, and (2) there is no federal question presented within the meaning of 28 U.S.C. 1257(3).

28 U.S.C. 1257, upon which petitioner relies for jurisdiction, reads as follows:

> Final judgments or decrees by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * *
>
> (3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

I. *This is not a final judgment.*

The first reason for denial of the petition is that the judgment is not final within the meaning of 28 U.S.C. 1257, as interpreted by this Court. In *Arnold v. U.S. for use of W. B. Guimarion and Company,* 263 U.S. 427, 44 S.Ct. 144, 68 L.Ed. 371, (1923), this Court said:

> It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete; that is, final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction. [Citing cases.] (263 U.S. 434)

Petitioner in this case seeks to bring her case in fragments; she seeks certiorari here while she still has a cause of action which may be tried in the trial court, namely the breach of express warranty claim which the Colorado Court of Appeals remanded for a new trial. If certiorari be granted now, she would still be able to get a trial in the Colorado District Court on the breach of express warranty issue, and, upon losing and appealing that cause of action, might end up petitioning this Court again on one of the issues in the same case. This is contrary to the intention of the "final judgment rule."

A great many cases have held that in cases where a state court has remanded part of a case, there is no finality for purposes of Supreme Court review. See for example *Reddall v. Bryan,* 24 How. 420, 65 U.S. 420, 16 L.Ed. 740 (1861), where a state circuit court refused an injunction, and the state court of appeals affirmed the lower court and remanded the case, and the plaintiff appealed to this Court. This Court dismissed the case for want of jurisdiction, the judgment of the highest state court being deemed not final. See also

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Houston v. Moore, 3 Wheat. 433, 16 U.S. 433, 4 L.Ed. 428 (1919), where Chief Justice Marshall dismissed the case for lack of finality where the Pennsylvania Supreme Court reversed the trial court and remanded with directions to award a *venire facias de novo*, and *Moore v. Robbins*, 18 Wall. 588, 85 U.S. 588, 21 L.Ed. 758 (1873), where the state appellate court had remanded to the lower court for further proceedings and the Supreme Court dismissed for lack of finality.

County of St. Clair v. Lovington, 18 Wall. 628, 85 U.S. 628, 21 L.Ed. 813 (1873), contains a succinct statement of what is "final" for purposes of Supreme Court review of a state judgment:

> "No judgment is final which does not terminate the litigation between the parties." (18 Wall. 628)

It is abundantly clear that the judgment standing in Colorado now does not terminate the litigation between the parties, as petitioner still has an outstanding cause of action which was remanded to the trial court, and which she has yet to pursue there.

II. *No federal question is presented.*

The second reason that this petition should be denied is that there is no federal question presented, nor indeed was one ever involved at any point in the case. 288 U.S.C. 1257, cited above, requires involvement of a federal question before this Court will hear a writ of certiorari from the highest court of a state with jurisdiction. Moreover, Supreme Court Rule 19, on considerations governing review on certiorari, asserts that review on certiorari will be granted only where special or important reasons exist; such a reason, as to a state court decision, would be, "Where a state court has decided a *federal question of substance* not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." (Emphasis added).

There is no provision for a writ of certiorari from a state court where no federal question is involved.

Medical Administrations' original complaint in County Court was a simple bill collection matter, and Ms. Eliopulos' counter-claim against Medical Administrations and Dr. Hildyard was a malpractice action involving claims of negligence, willful and wanton recklessness, and breach of warranty. All of these claims are matters entirely and exclusively within state jurisdiction. No federal statute was involved, no Constitutional issue, no United States treaty; in short, no matter of federal concern at all was ever in this case. That the Supreme Court denies certiorari where no federal question is involved is well established. *Durley v. Mayo,* 351 U.S. 277, 76 S.Ct. 806, 100 L.Ed. 1178, rehearing denied 352 U.S. 859, 77 S.Ct. 22, 1 L. Ed.2d 69 (1956), quoted with approval *Williams v. Kaiser,* 232 U.S. 471, 477, 478; 65 S.Ct. 363, 89 L.Ed. 398 (1945), when it set forth the following:

> It is a well established principle of this Court that before we will review a decision of a state court it must appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. [Citing cases.] (232 U.S. at 481)

The *Reddall* case, cited earlier, was an action in trespass against defendants who asserted that their authority to act upon plaintiff's land was derived from the Executive of the United States (as well as from the state legislature). The United States Supreme Court dismissed for want of jurisdiction because of lack of finality (discussed above) and also because there was *no right claimed under the laws of the United States,* but rather the claim was against rights asserted *by the United States and its agents.* Thus, there was no federal question.

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The *Durley* case contains numerous additional citations to cases establishing the "federal question" principle, but it is deemed to be such a well established principle that further citations here would be superfulous.

A look at the "Questions Presented" portion of petitioner's brief makes it clear that there is no federal question involved in the case. The first question raises an issue of fact, whether Dr. Hildyard's operative abilities were impaired, which was determined against petitioner in the Colorado courts. As the Colorado Court of Appeals said in its opinion:

> As to the claim that doctor's own physical impairment resulted in negligent performance of surgery due to lack of skill, the patient produced no evidence showing either negligence in the performance of the surgery or any impairment in the doctor's ability to perform, or in his performance of, this particular surgery. Further, there was no evidence to establish any causal connection between the surgery and the patient's condition thereafter. In fact, there was evidence indicating that her hearing actually improved following the operation. Her later regression was not shown to be in any way related to what the doctor had done.
> (Pet.'s brief, appendix B, p. 3a)

Questions Number Two and Three are also questions of fact as to the defendant doctor's alleged negligence in failure to inform his patient of the alleged impairment, which were also determined against petitioner in the trial court. The Court of Appeals said:

> The final negligence claim was premised on the allegations that the doctor was negligent in failing to advise the patient of the serious nature and circumstances, the risks, and the possible complications inherent in the proposed surgery, and in fail-

> ing to advise her of his own physical impairment, and that, as a proximate result of this negligence, the patient was damaged. There being no proof that her post-operative condition was caused by the surgery, that claim also was properly rejected. *Lamme v. Ortega,* 129 Colo. 149, 267 P.2d 1115; *Brown v. Hughes,* 94 Colo. 295, 30 P.2d 259.
>
> The patient having failed to prove the elements of negligence, a directed verdict was proper as to those claims. That there may have been a bad result is not of itself proof of negligence on the part of the doctor. *Brown v. Hughes, supra.* (Pet.'s brief, appendix B, pp. 3a, 4a)

Question Number Four asks, "Whether it is a patient's inherent right to be informed of the attending physician's disability before any surgery is attempted upon patient's body." (Pet.'s brief, p. 2.) This is the only one of the questions presented which can be characterized as a question of law, but it assumes the establishment of a fact which was determined not to be true in the trial court; it was determined that the physician did not have a disability which was related to his performance of petitioner's operation. This fact determination was affirmed in the Court of Appeals. The existence or not of a disability is properly decided in the trial court and may be looked into by the appellate court only where it appears that the trial court acted in bad faith or contrary to or unsupported by the evidence. As shown above, the Colorado Court of Appeals expressly affirmed the trial court's findings on the negligence issues.

Even assuming that a disability existed, the patient's right to be informed of it does not involve a federal question. No federal statue nor the Constitution grants such a right. The safety and welfare of its citizens have traditionally been deemed to be matters entrusted to the states, and properly so.

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Justice Douglas, in *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed. 379 (1973), stated that two of the policies served by the finality requirement are avoiding piecemeal review and minimizing federal intrusion into state affairs. This second policy is equally well-served by the federal question rule. Respondents assert that those two policies should govern the denial of certiorari in this case.

CONCLUSION

Respondents ask that this Court deny the petition for certiorari on the grounds that the judgment is not final and that no federal question is involved, and award such relief as to this Court seems just and proper.

Respectfully submitted,

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